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IN THE

Supreme Court of the United States

October Term, 1966

No. 29

Z. T. OSBORN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF AND MOTION OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Motion to Intervene and Interest of *Amicus*

The American Civil Liberties Union has been engaged in the defense of the Bill of Rights for over forty-five years. Much of its energy has been directed toward safeguarding the conditions necessary to the existence of a free society.

Privacy is essential to liberty. Invasions of privacy by the use of spies and the encouragement of crime pose a serious threat to the free society. Until now, virtually no judicial control has been imposed on such use, apart from defining what is impermissible entrapment. This case presents an opportunity for the Court to bring the initial decision to use these techniques under constitutional supervision. Insofar as such decisions as *Olmstead v. United States*, 277 U. S. 455 (1928) and *On Lee v. United States*,

343 U. S. 747 (1952) are authorities against such control, these decisions should be reconsidered and disapproved.

Amicus therefore requests leave to file the enclosed brief.

Statement of Facts

Petitioner, Z. T. Osborn, Jr., an attorney, appeals from the affirmance of a conviction for the crime of jury tampering (18 U. S. C. § 1503) under an indictment charging that in November, 1963 he "did request, counsel and direct" one Robert D. Vick to contact and offer to pay $10,000 to a member of a petit jury panel to induce the latter to vote for an acquittal in a pending case if he were selected to serve on that jury. The affirmance appears in 350 F. 2d 497 (6th Cir. 1965).

Petitioner Osborn was an attorney for James R. Hoffa in two trials in 1962 and 1963. In connection with a trial that commenced in 1962, Osborn had retained Vick, a Nashville police officer, to make background investigations of prospective jurors. Because of this connection with Hoffa, Vick feared he would lose his job and sought employment with the United States Government as an informer. He reported to Government agents in February and June, 1963, advising them that he had once worked and wished to work again for Osborn. In October 1963, Vick went to Osborn and, claiming to fear loss of his job and a need for money, sought employment. Osborn, knowing nothing of Vick's employment by the Government, again hired Vick to do background investigations of prospective jurors for the second Hoffa trial.

In connection with such investigations, Vick advised Osborn that one of the possible jurors in this second trial was Vick's second cousin, Robert Elliott. According to

Vick, Osborn asked him to see Elliott. Vick duly reported this to a Federal Agent Sheridan and the next day told Osborn—falsely—that Vick had seen Elliott and that the latter was susceptible to hanging the Hoffa jury. At trial, Vick justified this falsehood by saying he "was trying to find out what Mr. Osborn's intentions were" (Original Record, 265a), to "find out what he was going to do" (263a).

After learning of this, the Federal Bureau of Investigation informed two United States District Judges that Vick had advised them that Osborn was seeking to make contact with prospective members of the Hoffa jury. Though skeptical of the information, the judges authorized Vick to seek further information, carrying on his person a recording device. Vick recorded a subsequent conversation with Osborn, and the tape therefrom was used at Osborn's trial to corroborate Vick's testimony against him.

The conviction was affirmed by the Court of Appeals for the Sixth Circuit, which rejected, *inter alia,* contentions that Osborn had been unlawfully entrapped, and that his constitutional rights were violated by the use of the recording device and resulting tape.

Summary of Argument

1. Privacy is seriously invaded when the Government plants an undercover agent who deceptively either seeks evidence of crime or encourages the commission of a criminal act. Though perhaps necessary for crime detection, such invasions of privacy can destroy the delicate sense of trust which is essential to a free society, unless they are brought under constitutional and judicial control.

2. The Fourth Amendment to the Constitution provides at least one appropriate basis for such control, for it sets out the governing criteria for criminal investigations

which encroach on privacy. To satisfy such criteria, and because the use of spies and crime encouragement is particularly threatening, such techniques should not be employed without (1) a preliminary judicial ending of probable cause of crime, and (2) insofar as encouragement is concerned, a preliminary judicial finding of necessity.

3. Application of some Fourth Amendment requirements to the use of encouragement is already required by some decisions. Insofar as *Olmstead v. United States*, 277 U. S. 455 (1928) and *On Lee v. United States*, 343 U. S. 747 (1952), may be construed as authorities against the full application of the Fourth Amendment, they should be disapproved.

4. Requiring compliance with the Fourth Amendment is not likely to impede proper police work, for it will not prohibit the use of spies and encouragement, but will only regulate such use so that the policies of the Amendment may be as effectively enforced when the search is by deception as when it is by force.

5. The thesis propounded herein is not meant to deny the applicability of other constitutional provisions and doctrines such as the Fifth and Sixth Amendments and the due process clause.

6. Applying the Fourth Amendment to Petitioner's conviction, it is clear that the use of an undercover agent who encouraged the commission of a crime was not preceded by the requisite judicial findings of probable cause and necessity. The conviction should therefore be reversed and a new trial ordered without the agent's evidence.

ARGUMENT

I.

The uncontrolled use in law enforcement of spies and encouragement* produces encroachments on privacy so grave as to threaten a free society.

Freedom cannot survive without privacy; totalitarianism cannot tolerate it. Freedom, to be meaningful, means freedom to grow, to experiment, to err and to differ. It presupposes the ability to withdraw oneself from the community, to enter into intimate and circumscribed relationships, to be anonymous, to make only partial disclosure. Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's (Part I)*, 66 Colum. L. Rev. 1003, 1022-24 (1966). Privacy is thus a necessary condition of human dignity—the man whose acts, words or thoughts can be observed or brought forth at the will of another "is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant." Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N. Y. U. L. Rev. 962, 973-74 (1964).

This Court has long recognized and protected the claims of privacy, especially as these claims fall under the Fourth Amendment and the Self-Incrimination clause of the Fifth.

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* "The *police spy* [is one who] enters into conspiratorial plans for the purpose of obtaining information * * * His role is primarily that of an observer and reporter. The *stool pigeon* acts as a decoy to draw others into a trap. He solicits the commission of a crime. His part is that of a catalyst." Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L. J. 1091, 1092 (1951). Often the same person will play both roles. In this brief, the term "encouragement of crime" will be used instead of Professor Donnelly's "stool pigeon." See Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871 (1963).

See, *e.g. Boyd v. United States,* 116 U. S. 616 (1886); *Frank v. Maryland,* 359 U. S. 360 (1959); *Wolf v. Colorado,* 338 U. S. 25 (1949); *Mapp v. Ohio,* 367 U. S. 643 (1961). It has recently held also that "various [other] guarantees create zones of privacy." *Griswold v. Connecticut,* 381 U. S. 479, 484 (1965). There seems to have been little judicial consideration, however, of how privacy can be impaired by the use of spies and the encouragement of crime, and how such impairment can be controlled. Even though these techniques have the same purpose as many other investigative devices—*i.e.*, to obtain evidence of crime from a suspect without his knowing consent—no comparable method of control exists, even though the danger to privacy is at least as great. Indeed, the use of spies and encouragement represents an especially pernicious intrusion into privacy for by using such tactics, (1) society tries to ferret out not merely tangible externals, but the suspect's words and inner thoughts*; (2) it operates by deception and without notice and (3) it makes the suspect the instrument of his own destruction. The widespread use of these techniques is one of the most effective and economical methods of repression for it can quickly and efficiently rend the fabric of trust, always delicate and especially so in troubled times. For example, it has been reported that in South Africa, "the use of informers corrodes all human relations in the black townships. Mutual confidence between two friends becomes a dangerous luxury." Lilyveld, *Where 78% of the People*

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* "Why, look you now, how unworthy a thing you make of me! You would play upon me; you would seem to know my stops; you would pluck out the heart of my mystery; you would sound me from my lowest note to the top of my compass * * *." Hamlet to Rosencrantz and Guildenstern, *Hamlet,* Act III, Scene II, lines 339-43. Among its many qualities, the play brilliantly depicts the catastrophe befalling at least one society in which "the use of informers, accessories, accomplices, false friends or any of the other betrayals which are 'dirty business'," On Lee v. United States, 343 U. S. 747, 757 (1952) was rampant.

Are The "Others," N. Y. Times Magazine, June 19, 1966, 10, 20.* Indeed, in a free society, the very threat that such informers might exist is enough to arouse fear and outrage. See *Town Is Aroused By Secret Police,* N. Y. Times, August 13, 1966, p. 27, col. 1.

Even if "artifice and stratagem may be employed to catch those engaged in criminal enterprise," *Sorrells v. United States,* 287 U. S. 435, 441 (1932), techniques posing so great a danger to the free society cannot be left uncontrolled.

II.

The employment of spies and the encouragement of crime should comply with the requirements of the Fourth Amendment.

A. The appropriateness of the Fourth Amendment.

Although perhaps not the only pertinent constitutional provision,* the Fourth Amendment would seem to be necessarily applicable to the use of spies and encouragement. Such techniques constitute official invasions of privacy in order to obtain evidence or information from a suspect without his knowing consent, generally for use against him in a criminal or forfeiture proceeding. This is precisely the nature and purpose of the conventional search and seizure which brings the Fourth Amendment into operation. As Mr. Justice Frankfurter noted, after reviewing the history of the Fourth Amendment:

> "two protections emerge from the broad constitutional proscription of official invasion, the first of these is the

* When one African was asked why he did not ask his best friend to help him waylay some of the known informers (called "impimpi"), he replied "How do I know *he's* not an *impimpi*?" *Id.* at 22 (emphasis added).

* See Part IV below.

> right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second and intimately-related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life, liberty or property." *Frank v. Maryland,* 359 U. S. 360, 365 (1959).*

The very limitations presently imposed on the use of encouragement and entrappers, those who solicit and participate in the commission of crime on behalf of the Government, reflect the purely investigatory nature of this device —it may be used only "to catch those engaged in criminal enterprise," *Sorrels v. United States,* 287 U. S. at 441-42 (1932), "to detect those engaged in criminal conduct," *Sherman v. United States,* 356 U. S. 369, 383 (1958) (Frankfurter, J., concurring). It may not be used to create crime where it would not otherwise have existed. Indeed, the only justification for permitting the state to participate in creating a crime and then punishing the offender is that in certain offenses, particularly the victimless crimes, enforcement against "known" and "chronic" offenders, is otherwise impossible. See Donnelly, 60 Yale L. J. at 1113-14; Rotenberg, *The Police Detection Practice of Encouragement,* 49 Va. L. Rev. 871, 874-76 (1963; Note, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense,* 31 U. Chi. L. Rev. 137, 150-54, 172-74 (1963). Thus, as is shown by the discussion below of the probable cause requirement, some courts have required that

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* Although Justice Frankfurter was referring specifically to entry into a home, it is well established that Fourth Amendment relates to many other types of invasions of privacy. See, *e.g.,* Bielicki v. Superior Court of Los Angeles, 57 Cal. 2d 600, 371 P. 2d 288 (1962) (eavesdropping on public toilet); Henry v. United States, 361 U. S. 98 (1959) (automobile); Blok v. United States, 188 F. 2d 1019 (D. C. Cir. 1951) (search of employee's desk a violation despite supervisor's consent).

as a prerequisite to the use of the trap there be the same kind of pre-existing condition as in the typical search and seizure situations—that a crime has been or is being committed. *Cf. Becker v. United States,* 62 F. 2d 1007, 1008 (2d Cir. 1933) ("it has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than one instance in a uniform series"); Donnelly, 60 Yale L. J. at 1108 "a factual analysis of the entrapment cases discloses that the allocation of 'intent' to the defendant [which makes the defense unavailable] * * * actually depends upon whether the defendant was previously engaged in criminal activities of a similar character.")

B. The Fourth Amendment requires that before spies and encouragement be utilized, a judicial officer find that—

(1) Probable cause exists to believe that evidence of crime will be obtained; and

(2) At least insofar as encouragement is concerned, no other means is available to obtain such information.

1. *The Probable Cause Requirement.*

The requirements for compliance with the Fourth Amendment "are not technical or unreasonably stringent; they are the bedrock without which there would be no effective protection of the right to personal liberty." *Lopez v. United States,* 373 U. S. 427, 464 (1963) (Brennan, J., dissenting). They include limitations of the search to a specific place, and person, a ban on seizure of non-evidentiary matter, *id.* at 463-64, and the constitutionally explicit requirement of probable cause. The first two seem to have been met in this case: Vick focused on a specific suspect, in connection with a specific transaction and he seized words

which were the verbal acts necessary to commit the crime, and thus more than merely evidentiary.* No further discussion of the problems raised by these requirements is therefore necessary at this time.

The probable cause requirement, which was not met in this case, see pp. 13-14 below, is perhaps the most crucial of all especially in the encouragement situations. Encouraging crime, like the use of spies, is abhorrent partly because it depends on deception and betrayal. But other and separate instincts are also offended when the state resorts to encouragement. Much of the revulsion against such "dirty business" is derived from a feeling that a decent society does not tempt and solicit its people into crime, does not seek out, play upon and then punish the weak-willed and the susceptible. See the facts in *e.g., Sherman v. United States,* 356 U. S. 369 (1957); *Trent v. United States,* 284 F. 2d 286 (D. C. Cir. 1960); *U. S. ex rel. Toler v. Pate,* 332 F. 2d 425 (7th Cir. 1964). For who can cast the first stone? Which of us is more than "indifferent honest?" Indeed, few things cause greater resentment and, ultimately, contempt for the law than the use of an entrapper who may himself be a "drug addict, pickpocket, pimp or petty criminal." Donnelly, 60 Yale L. J. at 1094. *Cf.* Burroughs, *Feeding the Monkey* in Wakefield (ed.) THE ADDICT 80, 95-96 (1963). Nor is there much social value in punishing someone who, though easily tempted, would not have committed a crime without encouragement.

For these reasons, law enforcement authorities should not be permitted to spy, to tempt, to seek betrayals, except upon a clear showing that reasonable ground exists to

* Indeed, in crimes for which such tactics are used, the words sought and seized usually are the crucial criminal acts, for these crimes are generally either transactional, *i.e.*, vice, narcotics, liquor, gambling, or conspiratorial.

believe that a crime has been, is being or imminently will be committed.

Such a requirement would not be startlingly novel or overly exacting. A few courts have already imposed some kind of reasonable ground requirement for encouragement, even without applying the Fourth Amendment. See, *e.g.*, *Ryles v. United States,* 183 F. 2d 944 (10th Cir. 1950); *Heath v. United States,* 169 F. 2d 1007, 1010 (10th Cir. 1948); *Trice v. United States,* 211 F. 2d 513 (9th Cir. 1954); and see the suggestion of the British Royal Commission on Police Powers and Procedures (1929) quoted in Donnelly, 60 Yale L. J. at 1114, n. 65; Note, 31 U. Chi. L. Rev. at 173-74. Indeed, it has been said that because of the time, trouble and danger involved police rarely embark on encouragement unless they do have reasonable grounds for belief that the defendant is engaged in crime, though this seems to be a rather optimistic finding. *Compare Rotenberg,* 49 Va. L. Rev. at 875, *with e.g., United States ex rel. Toler v. Pate,* 332 F. 2d 425 (7th Cir. 1964); *United States v. Campbell,* 235 F. supp. 190 (E. D. N. Y. 1964). Moreover, the importance attributed by the prevailing entrapment doctrines to the defendant's predisposition reflects a belief that only the "chronic" and not the "situational" offender should be punished, Donnelly, 60 Yale L. J. at 113-14; thus, factual analyses of cases upon to 1951 showed that entrapment was a good defense to those who had not previously engaged in similar criminal conduct. *Id.* at 1108.

Nevertheless, many courts, both federal and state, have refused to require reasonable ground as a prerequisite to entrapment. *Silva v. United States,* 212 F. 2d 422 (9th Cir. 1954); *Washington v. United States,* 275 F. 2d 687, 690 (5th Cir. 1960); *Childs v. United States,* 267 F. 2d 619 (D. C. Cir. 1958); *People v. Wells,* 25 Ill. 2d 146, 182 N. E. 2d

689 (1962); Donnelly, *id.* at 1106. In some cases, reasonable suspicion has been held sufficient, *Childs v. United States, supra,* or a poor reputation, *Washington v. United States,* 275 F. 2d at 290. In other cases, the officer was not required to show any preliminary suspicion of criminality. *Silva v. United States, supra; People v. Wells, supra.*

2. *The "Necessity" Requirement for Encouragement.*

The existence of reasonable grounds for belief respecting the existence of crime and the availability of seizable matter is not enough, however, for that would ignore the especially odious aspects of the use of encouragement. These include first of all the bad example set simply by the State's reliance on temptations, false friends and crime creation, even if everyone performs his job as he should. But not everyone does perform his job so highmindedly. The potential for such abuses as frame-ups and false information is especially high in these cases, particularly where the informer's monetary or other return depends on a successful trap, as it often does. See *Williamson v. United States,* 311 F. 2d 411 (5th Cir. 1962). This is partly also because many of the informers are often criminals themselves, and would hardly boggle at false charges or frame-ups. See Donnelly, 60 Yale L. J. at 1094 n. 12 (of 150 cases in which one informer participated, 40 were admittedly framed). As a result, not only are innocent people jeopardized, but law enforcement is further discredited.

Because such abuses are quite unlikely in the purely search situation, a probable cause requirement may be enough in that context. But the unsavory nature and high abuse potential of encouragement calls for an additional preliminary showing that such tactics are necessary because no other means are readily available for obtaining

the necessary information or for apprehending and convicting the alleged offender.* Just as the "reasonableness" clause of the Fourth Amendment may have justified broadening the powers of the police in some contexts, *cf. Carroll v. United States,* 267 U. S. 132 (1925) so it may also justify contracting police powers where the device is inherently offensive and easily abused. Compare S. 2813, § 8(c)(3), 87th Cong., 2d Sess. (1962) (court authorized wiretapping permitted by Attorney General's bill only on a showing that "no other means are readily available for obtaining that information.")

3. *The Requirement Of A Preliminary Judicial Finding.*

Techniques so dangerous and inherently unsavory as spies and encouragement cannot be left to the initial discretion of the police officer. Some of the reasons were classically stated by Mr. Justice Jackson in *Johnson v. United States,* 333 U. S. 10, 13-14 (1948). Moreover, police officers who are used to such practices may be hardened and insensitive to the dangers. Finally, there will almost never be time pressures of the kind which would make prior recourse to a magistrate excessively burdensome. Thus, as with conventional searches, the use of spies and encouragement should take place only upon authorization by a neutral, disinterested magistrate.

C. Since there was no probable cause determination prior to Vick's approach to Osborn, the conviction based on evidence obtained by Vick's activities must be set aside.

The facts herein present a typical case of encouragement. Vick became a special employee for the F. B. I.

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* *Cf.* Rotenberg, 49 Va. L. Rev. at 876. (In many cases, encouragement is used despite the pre-existence of probable cause because the available evidence may be inadmissible and therefore inadequate to convict.)

sometime in early 1963. Apparently suspecting Osborn of jury tampering, Vick later deceived him into thinking Vick would participate in such tampering and encouraged Osborn into words and activities which, if the report thereof be believed, showed an attempt by Osborn to corrupt justice. All of this, Vick put it, "to find out what Mr. Osborn's intentions were * * *" (265a).

The record does not show, however, that Vick's suspicions were based on any solid fact, and there certainly was no preliminary finding by a magistrate of either probable cause or necessity.* Insofar as Vick's and the F. B. I.'s purpose was truly the detection of prior, current or imminent crime, the Fourth Amendment required a finding of probable cause before the attempt was made to search and extract damaging evidence from Osborn by fraud and deception.

A baseless search cannot be validated by what is seized. By the same token, a baseless trap may not be validated by its success. Since there was no preliminary finding—or even showing—of probable cause to justify the tactics used here, Vick's evidence should not have been received and the conviction should be set aside.

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* This is apart from the question of whether there was a proper finding of probable cause before the November 11 recording was made, touched upon in a footnote in the opinion below. 350 F. 2d 497, 503, n. 1.

III.

Some objections to the theory presented herein:

(A) *Olmstead v. United States*, 277 U. S. 438 (1928) and *On Lee v. United States*, 343 U. S. 747 (1952) should be disapproved;

(B) *Lopez v. United States*, 373 U. S. 427 (1963) is distinguishable;

(C) Law enforcement will not be seriously hindered.

A. Insofar as *Olmstead* and *On Lee* are authorities against judicial control of spies and encouragement, they should be disapproved.

Olmstead and *On Lee* can both be read as authorities against the thesis propounded herein. *Olmstead's* holding that the Fourth Amendment protects only against a trespassory seizure of tangible materials was clearly intended by Mr. Chief Justice Taft to permit the use of ruse and entrapment. 277 U. S. at 468.* But surely this decision, much criticized when first handed down, see Murphy, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS 125-26 (1965), has not been treated kindly by time, despite Mr. Justice Van DeVanter's hopeful assurances to his Chief Justice. Murphy, *op. cit. supra* at 126. The tangibility requirement has clearly been abandoned, see, *e.g.*, *Silverman v. United States*, 365 U. S. 505 (1961); *Lanza v. New York*, 370 U. S. 139, 142 (1962) and the trespass requirement has been subjected to the fate of most obsolete doctrines—sophistical and inconsistent distinctions. *Compare Goldman v. United States*, 316 U. S. 129 (1942) *with*

* The Government's brief argued that if wiretapping were brought under constitutional control, "on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded?" Quoted in Donnelly, 60 Yale L. J. at 1111-1112 n. 63.

Silverman v. United States, 365 U. S. 505 (1961) and *Clinton v. Virginia,* 377 U. S. 158 (1964) *rev'g,* 204 Va. 275, 130 S. E. 2d 437 (1963), (constitutional protection denied where eavesdropping device placed on but not into a wall, but available where it penetrated less than an inch); compare *Gouled v. United States,* 255 U. S. 298 (1921) with *On Lee v. United States,* 343 U. S. 747 (1952) (entry by false friend held a trespass in *Gouled,* but not in *On Lee* because tangibles not seized in *On Lee,* 343 U. S. at 753).

Although rendered virtually meangingless by subsequent decisions, the trespass requirement still stands as a bar to realistic assessment by this Court of the real interests involved—the appropriate means to reconcile the true claims of privacy with the real needs of law enforcement. It leaves law enforcement authorities completely free to invade privacy by any non-trespassory means at their disposal, no matter how great or insidious such means may be.* Moreover, as science and human ingenuity progress, a physical trespass—now often unnecessary and unwanted —will become even less necessary. We therefore ask this Court to disapprove explicitly so much of *Olmstead* as still requires a "trespass," so that the Court may turn to the genuine and perplexing problems involved in reconciling privacy with law enforcement.

Even if the Court is unwilling to discard the trespass principle completely, it should at least reject *On Lee's* limitation on *Gouled* and, in keeping with the current protection afforded intangible conversations, find the necessary trespass where a government informer obtains access to suspect's home or office my misrepresenting his mission or himself. Presently pending before this Court is *Lewis v.*

* For a current list of such devices including lasers, parabolic microphones and ultrasonic sound reflectors, see Westin, 66 Colum. L. Rev. at 1005-10.

United States, 352 F. 2d 799 (1st Cir. 1965), *cert. granted,* 86 Sup. Ct. 646 (Jan. 1966) which raises the issue of whether an entry obtained by misrepresentation is covered by the Fourth Amendment. It is therefore unnecessary here to present full argument on this issue, except to urge this Court to recognize the equation of force and deception which it found in *Massiah v. United States,* 377 U. S. 201, 206 (1964)* and to hold that a deceptive entry to obtain verbal or other knowledge is as much an invasion of privacy as a forcible entry to obtain tangibles. See *Fraternal Order of Eagles v. United States,* 57 F. 2d 93 (3d Cir. 1932); *Gatewood v. United States,* 209 F. 2d 789 (D. C. Cir. 1953); *United States v. Recklis,* 119 F. Supp. 687 (D. Mass. 1954); *United States v. Mitchneck,* 2 F. Supp. 225 (D. Pa. 1933); *cf.* Note, *Effective Consent to Search and Seizures,* 113 U. Pa. L. Rev. 260, 271-72 (1963); but see *United States v. Bush,* 283 F. 2d 51 (6th Cir. 1960); *Warren v. Territory of Hawaii,* 119 F. 2d 936 (9th Cir. 1941).

B. *Lopez v. United States* is distinguishable.

On the surface, *Lopez* presents an analogous situation: a federal agent "plays along" with an attempted bribe to obtain evidence to convict the attempted offeror. But *Lopez* contains two significant differences:

1. The agent was not hiding his identity or the result of a deceptive plant. Defendant initiated the transaction, in full knowledge of the agent's identity.

2. There was not even a suggestion, nor could there be, that the agent had induced the defendant to offer any bribes. Indeed, the agent indicated his reluctance to accept the bribe even during the crucial recorded conversation, but the defendant continued to press him. 373 U. S. at 431.

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* In *Massiah,* this Court agreed with Judge Hays that Massiah "was more seriously imposed upon * * * because he did not even know he was under interrogation by a government agent." 377 U. S. at 206.

The *Lopez* situation, which raises neither the spy nor the encouragement situation, is to be contrasted with the deliberate plant, flagrant deception and the clear encouragement, which took place here. Obviously, the agent's conduct in *Lopez* raises none of the dangers described above, even though some deception was practiced in the agent's instructions to "play along." See 373 U. S. at 430.

C. Placing spies and entrappers under Fourth Amendment controls is not likely to harm the real needs of law enforcement.

The requirements proposed herein will not seriously hinder law enforcement for it is not proposed that the use of spies and entrappers be prohibited, but only that they be brought under the control of a neutral judicial officer. Infiltration, decoys, solicitation, and the other necessary artifices and stratagems will still be permissible but only upon a showing that they are warranted by preexisting facts, and, insofar as encouragement is concerned, is the only means available. Where suspicion has focused on a particular individual, there is probable cause that a crime has been, is or immediately will be committed, and that non-evidentiary matter is available, a warrant would certainly be in order.

Where there is no probable cause, infiltration merely to test and to probe may well be proscribed.

Moreover, where espionage and sabotage are concerned, special provisions ensuring secrecy may also be appropriate, and the gravity of the danger might even justify a warrant on a somewhat lower probability of danger.

IV.

Other constitutional bases for judicial control: the Fifth and Sixth Amendments and the due process clause.

The focus of this brief on the Fourth Amendment is not intended to imply that other constitutional provisions may not be appropriate to controlling spies and encouragement. Depending on the facts, these could include the Sixth Amendment, the Fifth Amendment, and the due process clause of the Fifth and Fourteenth Amendments.

A. The Sixth Amendment.

The facts of this case present a particularly dangerous example of the use of spies and encouragement. Vick's undercover activities were aimed at Osborn's activities on behalf of Osborn's client, James R. Hoffa. Regardless of whether Vick obtained information relevant to the Hoffa defense, compare *Coplon v. United States,* 191 F. 2d 749 (D. C. Cir. 1951); *Caldwell v. United States,* 205 F. 2d 879 (D. C. Cir. 1953), a lawyer's apprehension that he may be spied upon or solicited, could do much to dampen the vigor of his defense. Background investigations of prospective jurors are necessary to adequate trial preparation. If a lawyer knows he faces spies and informers in this task, he may well be afraid to undertake it, thereby prejudicing his client. *Compare Holt v. Virginia,* 381 U. S. 131 (1965) (contempt citation for lawyer's conduct that was found to be improper by state court held to violate due process clause). It would thus be appropriate for this Court to hold that such tactics cannot ever be used against a lawyer.

B. The Fifth Amendment.

The privilege against self-incrimination is also an appropriate source of control over these devices—the use of spies and entrappers constitutes an attempt to obtain evidence against a defendant from his own mouth, without his knowledge or consent. Such tactics are thus squarely in conflict with the accusatorial nature of our system. *Malloy v. Hogan,* 378 U. S. 1, 7-8 (1964). Indeed, *Miranda v. Arizona,* 86 Sup. Ct. 1602 (1966), deals expressly with the kind of deceit which characterizes this aspect of the use of spies and entrappers by condemning all attempts to induce a defendant to waive his privilege against self-incrimination by trickery or cajolery. 86 Sup. Ct. at 1629. In this respect, it merely carried out the implications of such decisions as *Massiah v. United States,* 377 U. S. 201 (1964) and *Spano v. New York,* 360 U. S. 315 (1960), where deceit and betrayal were used to obtain verbal evidence from the defendant to be used against him. Though these cases turned on counsel and voluntariness considerations, the necessary implication of the self-incrimination clause is of course obvious.

Finally, the use of spies and entrappers may also raise other grave issues having to do with the purity of the courts, see *Sorrells v. U. S.,* 287 U. S. at 455, 459 (Roberts, J., concurring), fundamental fairness, and the "act" requirement. See *Robinson v. California,* 370 U. S. 660 (1962); Note, *"The Serpent Beguiled Me and I Did Eat"—The Constitutional Status of the Entrapment Defense,* 74 Yale L. J. 942, 946 (1965).

Conclusion

Because the Fourth Amendment is properly applicable to official use of spies and encouragement, and because the use of Mr. Vick to spy upon and trap Petitioner was not preceded by a judicial finding or probable cause and necessity in accordance with Fourth Amendment requirements, Petitioner's conviction must be set aside, and a new trial ordered without the evidence obtained by Mr. Vick.

Respectfully submitted,

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